OVERSEA-CHINESE BANKING CORP. LTD.

v.

PENDAFTAR HAKMILIK, NEGERI KEDAH

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[ORIGINATING MOTION NO. 25-37-89]
26 MAY 1990

LAND LAW: *Registrar's caveat - Income tax owed to Department of Inland Revenue - Land also charged to bank - Whether letter by Department of Inland Revenue sufficient for entry of Registrar's caveat - Whether discretion to enter Registrar's caveat was properly exercised - Whether decision of Registrar to enter caveat was 'ultra-vires' the National Land Code - Sections 267, 268(1), 268(3), 319(1)(b)(i), 320(1)(b)(i), 320(1)(ba), 321(3)(c), 418 National Land Code - Section 10(1) Government Proceedings Act 1956.*

The respondent lodged a Registrar's caveat in respect of a piece of land which had been charged to the applicant (bank). The Registrar's caveat was entered pursuant to a letter from the Department of Inland Revenue requesting the respondent to enter a caveat under s. 320 of the National Land Code. The letter stated that the owner of the land (chargor) owed income tax which had yet to be settled and the Registrar's caveat was sought to protect the Government's interest. When the Registrar's caveat was entered, there were already in existence four charges on the land in favour of the applicant bank.

This was an appeal by the applicant bank to the High Court under s. 418 of the National Land Code against the Registrar's decision to enter the Registrar's caveat.

Held:

[1] The Registrar of Land Titles, upon becoming aware that there is a charge on the land, cannot enter a Registrar's caveat.

[2] The entry of a Registrar's caveat was at the discretion of the Registrar and the failure of the Registrar to take into consideration the existence of the four charges which had been entered in respect of the land when entering the Registrar's caveat, was therefore *ultra vires* the National Land Code.

[3] The second perspective in the context of the *ultra vires* doctrine was that the Registrar has to have vitally important information relating to the value of the Government debt, the land and the debt or debts covered by the charges before he can make a proper decision whether to enter a caveat.

[4] In this case, the Registrar did not know the value of the Government debt nor the value of the debts covered by the charges. Although he may have known the market value of the land but that alone was not enough. Decision to enter the Registrar's caveat was therefore based on insufficient facts.

[5] The debt due is income tax due and payable by a tax-payer and is merely an unsecured civil debt; s. 320(1)(ba) of the National Land Code does not turn a mere unsecured debt into a secured debt in relation to the land or otherwise give it the status of a registrable interest on the land.

[Appeal allowed with costs. Decision of Registrar to enter Registrar's caveat set aside.]

Cases referred to:

Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44
Roberts v. Hepwood [1925] AC 78
Associated Provincial Picture Houses v. Wednesbury Corpn. [1947] 2 All ER 680

Legislation referred to:
Government Proceedings Act 1956, s. 10(1)
National Land Code 1965, ss. 267, (1), 268(1), (3), 319(1)(b)(i), 320(1)(ba), 321(3)(c), 418

For the applicant - Mary Sharmani Nitchingham; M/s. Shook Lin & Bok
For the respondent - Hj. Abdul Malik bin Hj. Ishak, State Legal Adviser

JUDGMENT

KC Vohrah J:

The respondent, the Registrar of Titles, State of Kedah, lodged a Registrar's caveat in respect of a piece of land which had been charged to the applicant. And the applicant in this motion has appealed, under s. 418 of the National Land Code (the Code), against the respondent's decision.

On 14 August 1986 the respondent received a letter from the Department of Inland Revenue, Alor Setar requesting the Registrar to enter a Registrar's caveat on a piece of land SP 64992, Mukim of Alor Setar, Kota Setar belonging to one Tan Bok Lean.

The relevant portion of the letter states (translated from Bahasa Malaysia):

> Sir,
>
> Tan Bok Lean (IC No. 2228552)
> **Section 320 NLC - Registrar's Caveat.**
>
> With reference to and concerning the above-named, please be informed that he owes income tax to this department which sum is yet to be settled. In order to safeguard the Government's interest in this matter, please lodge a registrar's caveat pursuant to s. 320 National Land Code upon the following property:

Grant	Mukim	District
SP64992	A/Setar	Kota Setar

On the same day the respondent received the said letter he lodged a Registrar's caveat in respect of the said land.

However, at the time the Registrar lodged his caveat on the said land the land had already four registrable interests registered in respect of the land. These were the four charges on the land in favour of the applicant, a bank (the bank) which were made on the land on 8 March 1971, 16 September 1974, 23 September 1979 and 26 May 1982 respectively. These charges had been executed by Tan Bok Lean (the person named in the said letter as owing income tax) in favour of the bank for the purpose of securing re-payment to the bank of various overdraft facilities granted by the bank to one Lean Teik Company.

The bank in 1987 filed an originating summons to obtain an order for the sale of the said land to recover the sums due to the bank on breach of the agreements to pay to the bank under the charges and on 3 April 1988 an order for the sale of the said land was obtained. It is clear from the affidavits filed that the bank was unaware of the Registrar's caveat which had been lodged in 1986 and needless to say the Registrar's caveat does not make the sale of the land viable.

A notice of entry, Form 19A, dated 8 August 1986, of the Registrar's caveat was sent to the chargee, the bank, on 4 October 1989. The bank being aggrieved by the decision of the Registrar appealed against his decision to the High Court under s. 418 of the Code. Thus this motion before the Court.

The reasons given by the Registrar for lodging the caveat are stated in his affidavit. He states that on receipt of the letter from the Department of Inland Revenue it appeared to him:

> that it was necessary to protect the interest of the Federation and it was also apparent that taking into consideration the provisions of subsection (1)(ba) of s. 320 of the National Land Code 1965, the said land belonging to the said Tan Bok Lean will be available to satisfy the whole or part of any debt due to (the Inland Revenue Department).

It appears thus that the Registrar relied on two provisions of the code when he lodged his caveat. As the learned Legal Advisor for the State of Kedah pointed out, the Registrar relied on the provisions of paras. (b)(i) and (ba) of s. 320(1) of the Code for lodging the said Registrar's caveat in respect of the said land.

In so far as the Registrar relied on para. (b)(i) of s. 320(1) of the Code to lodge his caveat it seems clear that on the authority of *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44 he could not do so. All the letters of the Department of Inland Revenue to the Registrar show is that one Tan Bok Lean is indebted to the Federation for income tax. How much is owed is not stated. It is not stated that the debt is a judgment debt. And there is nothing in the affidavit of the Registrar which indicates that he acted on other information when he relied on s. 320(1)(b)(i) to lodge the Registrar's caveat on the said land. The debt due to the Federation from Tan Bok Lean, the tax-payer, is income tax due and payable and is merely an unsecured civil debt; it does not give rise to a legal right in or over the said property of Tan Bok Lean nor to any remedies against the same property. It is clear from *Temenggong* that the debt is a mere personal claim against Tan Bok Lean and does not come within the meaning of "interests" in para. (b) of s. 320(1) of the Code.

As earlier mentioned the Registrar also relied on para. (ba) of s. 320(1) when he lodged his caveat on the said land.

Paragraph (ba) of s. 320(1) was added in 1979 with effect 16 February 1979 by Act A444 and with it there is no requirement that the interests of the Federation or the State Authority sought to be protected must be those on the land that are recognised by the code as being registrable. On the other hand the provision does not turn a mere unsecured debt into a secured debt in relation to the land or otherwise give it the status of a registrable interest on the land. The provision states,

> 320(1) Subject to sub-section (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable:
>
> (a) ...
>
> (b) ...
>
> (ba) for securing that the land will be available to satisfy the whole or any part of the debt due to the Federation or the State Authority, whether such debt is secured or unsecured and whether or not judgment therein has been obtained; or
>
> (c) ...

As regards the Registrar's reliance on para. (ba) of s. 320(1) it appears, too, that the Registrar did not rely on anything beyond the letter of the Department of Inland Revenue requesting for his caveat to be lodged on Tan Bok Lean's land. The letter itself states precious little. We know that for the purposes of para. (ba) of s. 320(1) whether the debt is secured or unsecured is an irrelevant consideration to be taken into account. Also irrelevant is whether

judgment on the debt has been obtained. But while the lack of information on these matters is not material it does not follow that other material matters should not be taken into account for the purposes of the provision.

A Registrar's caveat may, under s. 321(3)(c) of the Code, be cancelled pursuant to an order of the Court made on an appeal under s. 418 against his decision to enter the caveat. The Court's role under s. 321(3)(c) is, however, limited, arising out of the Court being an Appeal Court. Since a discretion is vested in the Registrar when he acts under s. 320, the Court's role as an Appeal Court is to see whether the decision of the Registrar is *ultra vires* the provision giving him the discretion.

In the context of the *ultra vires* doctrine one of the questions is whether the person exercising the discretion exercised his discretion reasonably and took into proper consideration elements which ought to have been taken into account or whether they were not taken into account. *Roberts v. Hepwood* [1925] AC 578 (the *Poplar* case) illustrates this principle. Metropolitan borough councils were empowered by statute to pay to the employees "such ... wages as (the Council) may think fit". The Council of the Metropolitan Borough of Poplar paid to certain workmen rates of wages considerably in excess of the general level of wages prevailing in the district because they considered that the general level did not amount to a reasonable living wage. The District Auditor acting under the provisions of another statute disallowed these payments and surcharged the consequent deficiency upon those councilors who had voted for this decision. The House of Lords upheld the District Auditor holding that the discretion conferred upon the council by the statute must be exercised reasonably and that the fixing by the council of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of the discretion. The council had in fact failed to take into account of the fact that the general cost of living had substantially fallen, before they had decided to increase the wages (see also the explanation of Lord Greene MR in *Associated Provincial Picture Houses v. Wednesbury Corpn*. [1947] 2 All ER 680 at p. 684).

Discretion is vested in the Registrar under s. 320(1)(ba) of the Code and from the tenor of the provision it would appear that several material matters would need to be considered by him before he enters the Registrar's caveat.

The point is that when there is a charge registered in respect of a piece of land there are concomitant legal rights which inhere in the hands of the chargee. It is inconceivable that the Legislature would imperil legitimate rights of the chargee provided by the code by allowing a Registrar's caveat to freeze the register and impede legitimate procedures being prosecuted under the code in respect of such rights.

One of the rights of the chargee, when the chargor has breached any of his agreements relating to the charge, is for him to apply to Court under the code and obtain an order for sale of the land to recoup his losses. With the Registrar's caveat entered in respect of the land his right to sell under the Court order appears to be impaired. Even if a sale does go through and a certificate of sale (which under s. 267(1) of Code is treated as an instrument of dealing) is issued that instrument cannot be registered so long as the Registrar's caveat exists in respect of the land (see s. 319(1)(b)(i) of Code). And yet the Registrar's caveat does not, under the code, create a registrable interest in the land nor create any priority in favour of the Federation in respect of an unsecured civil debt which has no connection whatsoever with the land.

One can hardly sell the land with the Registrar's caveat entered in respect of it. What then can the chargee do to recoup his losses in relation to the charged land? What can the Federation, at whose request the caveat was lodged, do with regard to the land in respect of its unsecured debt? Is it the purpose that a Registrar's caveat be lodged to compel the chargee of the land to negotiate with the Government over the debt of a third party, that which the registered owner of the land owes the Government? Some arm twisting where the Government is to be given priority over the chargee for the debt? That to my mind is unthinkable.

It seems to me that once there is a charge registered in respect of the land a Registrar's caveat is incapable of being entered in respect of the land for it cannot possibly appear "necessary or desirable" to him "for securing that the land will be available to satisfy the whole or any part of the debt due the Federation" since the caveat will not transform an unsecured debt into a secured debt let alone give the debt a priority over other registered interests in the land; instead the caveat serves to interfere with the legitimate right of the chargee to sell the land under the provision of the code to recoup losses secured by the charge. A charge entered in respect of the land with concomitant rights arising under the code cannot count for nought when a Registrar's caveat is sought to be entered in respect of the land by the Government under para. (ba) s. 320(1). It is reasonable to expect the Registrar not to overstep the legitimate interest of other persons or bodies who have charges and concomitant rights, all arising from the code, on the land to their detriment.

Thus, in my view, once the Registrar is aware that there is a charge on the land he cannot enter a Registrar's caveat under para. (ba) of s. 320(1). The Registrar must, in this case, have been aware of the fact that four charges had been entered in respect of the land and, with respect, he failed to take into proper consideration of that fact when he entered his caveat on the land. His decision in the context of the *ultra vires* doctrine is not proper.

On the other hand if I am wrong in coming to such a conclusion, there is a second perspective of the matter, again in the context of the *ultra vires* doctrine. If the amount secured by a charge or charges on the land is less than the value of the land and a sale by order of Court is held there will be a residue after deduction of the debt and other monies as provided for under s. 268(1) of the Code. This residue will have to be paid to the chargor, the landowner, under s. 268(3). If it is argued and accepted that a Registrar's caveat may be entered under para. (ba) of s. 320(1) on land notwithstanding that there are charges registered in respect of it then perhaps the objective of allowing a Registrar's caveat to be entered in respect of the same land is to prevent dissipation of this residue which has to be paid to the landowner, the debtor of the Federation. If that is indeed the objective it is this residue, not the land, which the Government, perhaps, would have a stake in with preference of payment in respect of all or some of the residue bearing in mind s. 10(1) of the Government Proceedings Act 1956 which provides:

> All debts due and claims owing from time to time by any person to the Government, whether upon judgment, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have been contracted or incurred by or become due from such person to any other person whomsoever.

Now neither s. 10 of the Act nor any other provision in the code confers any preference of rights in immovable property on the Government in respect of an unsecured debt but some or all of the residue (after a Court sale of the land) which has to be returned to the landowner

could perhaps be the subject of preference of payment to the Government. This would arise if by the time of the day appointed by Court for the sale of the land by the chargee the Federation has obtained judgment on the debt. Viewed in this context the entering of the Registrar's caveat, perhaps, is to allow the Federation time to obtain judgment on the debt under the Income Tax Act so that the debt would have preference over other debts in terms of s. 10(1) of the Government Proceedings Act 1956 in respect of some or all of the residue of the sale price paid to the landowner, the debtor, after the caveat is lifted for the sale.

In regard to the second perspective that I have taken there are matters which the Registrar would have to consider under para. (ba) of s. 320(1). While the Registrar may ignore whether a debt is secured or whether judgment has been obtained he has, however, to consider other material matters. He has, as I have stated earlier, to consider whether "the land will be able to satisfy the whole or any part of the debt due to the Federation." It must appear to the Registrar to be necessary or desirable that "the land will be able to satisfy the whole or any part of the debt". The language used in the provision, as I have previously observed, shows that the Legislature recognises that the legitimate interests of other persons or bodies who have registrable interests and concomitant legal rights on the land will first have to be considered before the Registrar imposes the caveat. In the context of looking at the value of the residue that would be available to the owner of the land after a sale of the land it is reasonable to expect the Registrar to be seized of the value of the debt owed to the Government, the value of the land and the value of the debt for which the charges on the land were created. He cannot act on airy fairy surmises nor can he may make unwarranted inferences from information which is scanty.

If the value of the charges in respect of the land equals or exceeds the value of the land there cannot be any surplus for the landowner and it is hard to see how it can possibly appear to the Registrar that it would be necessary or desirable for securing that the land "will be available to satisfy the whole or part of" the debt due to the Government. Thus the Registrar has to have vitally important information relating to the value of the Government debt, the land and the debt or debts covered by the charges before he can make a proper decision whether to enter the Registrar's caveat.

So far as the debts covered by the charges are concerned the value of the debts covered by the charges (which can be ascertained by the Registrar from the charge instruments (Form 16) presented and kept in the registry) at the time the Registrar's caveat was requested to be entered may well have exceeded the market value of the land especially because of the slump in the value of land. If the value of the debts covered by the charges was in excess of the value of the land then no question of "securing that the land will be able to satisfy the whole or any part of the debt due to the Federation by the landowner" arose. In this case it is clear the Registrar did not know the value of the Government debt, nor did he know the value of the debts covered by the charges. He may have known the market value of the land but that alone is not enough. With respect the decision to enter the Registrar's caveat was based on insufficient facts.

In taking either view of the two perspectives of the Registrar's discretion under the *ultra vires* doctrine my conclusion is that the discretion was not properly exercised. And I therefore had it set aside and allowed the application with costs.

Also found at [1990] 2 CLJ 275